(2)

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

No. 97-801

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Ronald D. Maines
Counsel of Record
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

Date: January 12, 1998

22 pp

QUESTIONS PRESENTED

1. Whether the federal government, having entered into fixed-price contracts to sell certain services, may subsequently enact legislation that imposes additional costs—incurred by the government in providing those services—predominantly on the purchasers under the previous fixed-price contracts.

2. May Congress impose retroactive financial liability on companies based solely on the fact that they purchased government services as much as thirty years ago?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 4

I. PARAMETERS OF THE SOVEREIGN ACTS ANALYSIS 4

II. THE FEDERAL CIRCUIT'S OPINION RESTS ON SEVERE ANALYTICAL MISTAKES 8

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: Page

Arizona v. Mauro, 481 U.S. 520 (1987) 17
Cooke v. United States, 91 U.S. 389 (1875) 4
Foucha v. Louisiana, 504 U.S. 71 (1992) 16
Horowitz v. United States, 267 U.S. 458 (1925) 4
Lynch v. United States, 292 U.S. 571 (1934) 4, 10
Perry v. United States, 294 U.S. 330 (1935) 4
United States v. Smith, 94 U.S. 214 (1976) 4
United States v. Winstar, 116 S.Ct. 2432 (1996) ..... *passim*

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.2 of this Court, Washington Legal Foundation respectfully submits this brief *amicus curiae* in support of petitioner.[1] Consent to the filing of this brief has been granted by counsel for all parties, and letters have been lodged with the Clerk.

Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C. WLF devotes substantial resources to promoting private property rights and due process for businesses by publishing on these subjects through WLF's Legal Studies Division and by participating in related litigation. For example, WLF has appeared as *amicus curiae* in a number of cases challenging the constitutionality of legislation under the Due Process and Takings Clauses of the Fifth Amendment. *See, e.g., United States v. Carlton*, 512 U.S. 26 (1994); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Relatedly, WLF is concerned that the federal government not be permitted to retroactively impose costs on its contracting partners. Such conduct not only exposes government contractors to unfair and unpredictable expenses, but also impairs the government's reliability as a contracting partner.

---

[1] Pursuant to SUP. CT. R. 37.6, counsel for Washington Legal Foundation state that they have authored this brief in whole, and that no person or entity other than Washington Legal Foundation, its members, and counsel, have made a monetary contribution to the preparation or submission of the brief.

WLF believes that its perspective will complement the brief of the petitioner and be of material assistance to the Court in deciding the issues in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a famous passage from *De Oratore*, Cicero likens the construction of a legal argument to the building of a house. The process can proceed well or poorly—and the result will be a temple or a hovel—depending on the integrity of successive steps and adherence to formal rules of structure. Moreover, bad arguments with the outward appearance of stability, like a house with a ramshackle infrastructure, wobble and fall all the same.

Like Cicero's examples of ill-fated arguments, the Federal Circuit's rationale for applying the "sovereign acts" doctrine to uphold the legislation challenged in this case, cannot withstand scrutiny. From the first brick in the edifice, the court's analysis goes awry. Structurally, the court's argument that Congress, in enacting the Energy Policy Act, effected a "public and general" purpose, rests on a textbook fallacy of logic. Further analytical problems—related mainly to confusion over notions such as ascertaining the "purpose" of the legislation and the meaning and import of "public and general"—irreparably sabotage the court's holding.

Substantively, the Federal Circuit's argument fares no better. The two propositions offered as the keystones of the rationale—(i) that the Act singles out, not previous contractors, but beneficiaries of the DOE's services; and (ii) that not all, and not only, previous

contractors are assessed—are not sufficient grounds, either independently or together, to conclude that the challenged government action is "public and general."

The analytical problems in the Federal Circuit's decision flow from its misunderstanding of *United States v. Winstar*. There this Court reaffirmed the *general rule* that government is bound by the rules of contract when it acts in its capacity as a contractor. Although any substantive explication of the *Winstar* approach to the sovereign acts doctrine is oddly absent from the Federal Circuit's analysis, that court—purportedly guided by *Winstar*—effectively expands the sovereign acts doctrine into an exception that swallows the general rule. In the process, the court excuses the challenged action even though the assessment caused by the Act falls substantially on the government's contracting partners.

As petitioner persuasively demonstrates (Pet.7-16), the decision of the Federal Circuit cannot be squared with *Winstar* and establishes a dangerous precedent in a court that is the principal forum for government contracts litigation. Grant of the petition will provide the Court with the opportunity to clarify several doctrinal points the Federal Circuit grossly misconstrues. Beyond this jurisprudential reason for review, the case arises in an area of law where huge financial repercussions for American business hang in the balance. It is thus a manifestly important case for the Court to address. For these reasons, the petition should be granted.

ARGUMENT

I. PARAMETERS OF THE SOVEREIGN ACTS ANALYSIS

1. *Background.* The federal government generally is bound by contractual obligations similar to those of private parties. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also United States v. Smith*, 94 U.S. 214, 218 (1976) (if between private parties the conduct "would be considered an improper interference, and damages would be awarded to the extent of the loss . . . . [t]he United States must answer according to the same rule"); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there"); *Perry v. United States*, 294 U.S. 330, 352 (1935).

The "sovereign acts" doctrine is an exception to this general rule. It provides that the government as a contractor is not liable for the breach of contract damages resulting from its "public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461 (1925). By creating an exception from contractual liability where the government acts "as sovereign," the doctrine allows for legislation that affects the public interest without subjecting the government to liability for incidental effects its actions may have on a range of contracts with private parties. However, the doctrine expressly recognizes that the

government lacks the power to abrogate its contractual obligations to private parties with impunity, because it affords immunity only when an act is "public and general."

2. *Winstar Principles.* The Court's most recent discussion of the sovereign acts doctrine came in *United States v. Winstar*, 116 S.Ct. 2432 (1996). The *Winstar* litigation grew out of the savings and loan crises of the 1980s, and measures to solve the problems legislatively in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The plaintiffs claimed that, by enacting FIRREA, Congress breached the terms of agreements between federal agencies and themselves. The agencies had made the agreements to induce the plaintiffs and others to merge with insolvent thrift institutions.

In *Winstar*, a plurality decision authored by Justice Souter, the Court found that FIRREA did not qualify for the sovereign acts defense because the statute was not "public and general." The analysis began by reiterating that, when government acts in its capacity as contractor, rather than as sovereign, it is subject to the same rules that bind private contractors. *Id.* at 2465. The principal opinion rejected the government's argument that the sovereign/contractor distinction should turn on whether a law is "enacted to govern regulatory policy or to advance the general welfare," *id.* at 2464, because it is too difficult to distinguish when the government is acting in its regulatory versus nonregulatory capacity. *Ibid.*

Instead, the Court fashioned an approach that considers the relative degree of "self-interest" in a governmental action: "[S]ome line has to be drawn in situations like the one before us between regulatory legislation that is relatively free of governmental self-interest and therefore cognizable for the purpose of a legal impossibility defense and, on the other hand, statutes tainted by a governmental object of self-relief." *Id.* at 2465. By self-interest, "[W]e simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *Ibid.*

This emphasis on assessing the extent of governmental self-interest allows the government to escape contractual consequences of its action *only* where "the action's impact upon public contracts is, as in *Horowitz*, merely incidental to the accomplishment of a broader governmental objective." *Id.* at 2466. This approach steers a middle course, said the plurality, between (1) the dissent's position that "[t]he United States as a contractor [is] not responsible for the United States as a law giver," and (2) the position that "any benefit at all to the Government" would render an act insufficiently public or general. *Id.* at 2467.

To apply this standard, the plurality articulated the following test: A governmental act is not "public and general" where it "has the substantial effect of releasing the Government from its contractual obligations." *Ibid; see also id. at 2466* (a key factor is whether "a substantial part of the Government's action . . . falls on its own contractual obligations"). Applying this test to FIRREA, the Court observed that the statute

"had the purpose of eliminating the very accounting gimmicks that acquiring thrifts had been promised." *Ibid.* The opinion made clear that its analysis looked beyond whether FIRREA was "formally general." *Id.* at 2468. It rejected the government's argument that FIRREA was public and general because FIRREA had a clear public purpose to realign the thrift industry. That argument, said the Court, proves too much:

> We assume nothing less of all Congressional action, with the result that an intent to benefit the public can no more serve as a criterion of a "public" and "general" sovereign act than its regulatory character can. While . . . Congress acted to protect the public in the FIRREA legislation, the extent to which this reform relieved the Government of its own contractual obligations precludes a finding that the statute is a "public and general" act for purposes of the sovereign acts defense.

Id. at 2468-69.

The Court found ample evidence that Congress was aware of the adverse effect FIRREA's provisions would have on government contracts with the plaintiff institutions. *Id.* at 2467-69. This congressional concern with the impact of FIRREA "suffice[d] to demonstrate that FIRREA had the "substantial effect of releasing the Government from its own contractual obligations." *Id.* at 2468.

The Court dismissed the notion that it had constructed a "legislative intent" test. Rather, legislative intent in this case was evidence of the

statute's "substantial effect." *Id.* at 2468 n. 50. The Court further distanced itself from an intent test by positing as an alternative—but rejecting as too difficult to apply—an inquiry that examines whether "the predominant purpose or effect [of a government act] was avoidance of the Government's contractual commitments." *Id.* at 2467 n. 46.

* * *

As demonstrated below, severe analytical problems wholly undermine the Federal Circuit's decision. These infirmities flow from the lower court's apparent misunderstanding of *Winstar*'s formulation of the sovereign acts doctrine. The result is that, if the Federal Circuit's analysis were accepted, it would expand the sovereign acts doctrine into an exception that swallows the general rule.

II. THE FEDERAL CIRCUIT'S OPINION RESTS ON SEVERE ANALYTICAL MISTAKES

The Federal Circuit in its opinion below constructed its argument in two parts. The first part purports to frame the test for determining whether the Government has acted as contractor or sovereign. The second part is the substantive argument itself. Both of these basic steps are analytically defective.

1(a). *Framing the Test.* The Federal Circuit described the sovereign acts doctrine as a "case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts." App. 9a. Accordingly, the court viewed its task as

deciding "whether the Government, in enacting the relevant provisions of the Energy Policy Act of 1992, was (i) acting for the purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic (*i.e.*, the legislation was passed for the benefit of the Government-as-contractor) or (ii) acting for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public)." *Ibid.*

1(b). *Two Analytical Mistakes.* The lower court's formulation commits at least two logical errors. The first is a straightforward instance of the fallacy of false dichotomy. The court's approach depends on the view that no logical intersection exists between the two categories—that *either* (i) the Act had the "purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic," *or* (ii) the Act had the "purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities." But that is a false distinction. Alternatives (i) and (ii) are not mutually incompatible. Specifically, even if we assume *arguendo* that alternative (ii) is true—that a purpose of the Act was to address the decontamination and decommissioning problem—that is not a valid reason for concluding that petitioner's claim is not meritorious. In other words, alternative (ii) is not sufficient to establish that the Act is "public and general." The court is, wittingly or unwittingly, trying to create a rhetorical contrast in order to reject (i) and accept (ii). In framing the test this way, the Federal Circuit achieves precisely what the fallacy of false dichotomy beguilingly offers: An unfair

characterization of the dispute that erroneously prejudices the outcome of the argument.

There is a second problem with the Federal Circuit's statement of the test. The court wishes to demonstrate that the sovereign acts defense is applicable because the Government's acting to solve the problem of decontamination and decommissioning means "the legislation was passed for the benefit of the public," *ibid.*, and is accordingly "public and general." But nothing in the second alternative implies this. That the government was acting to solve the problem of decontamination and decommissioning of uranium enrichment facilities does not, at least in any meaningful sense, imply that the activity meets the "public and general" criterion. If the Federal Circuit's logic were sound, virtually all acts of the government-as-contractor could be defended as "sovereign acts," because nearly all legislation has a public and general dimension. Reasoning from the specific subject matter of the legislation to generalize that the legislation is therefore public and general, is logically invalid.

Moreover, evidence that the legislation in question is passed "for the benefit of the public," *ibid.*, is similarly insufficient to show that the activity is "public and general." The legislative purpose or intent to act for the public good does not necessarily yield legislation that is "public and general." For example, in *Lynch v. United States*, 292 U.S. 571 (1934), the plaintiffs had entered into agreements with the United States for War Risk Insurance and had paid the required monthly premiums. Congress subsequently enacted the Economy Act, which repealed "[a]ll laws granting or

pertaining to yearly renewable term insurance." *Id.* at 575. This Court held the legislation unlawful. This is an example of a case where Congress plainly had acted with a purpose or intent to benefit the general weal at a time of "great need of economy," *id.* at 580, yet the specific effect that the legislation had on the plaintiffs rendered the legislation unlawful. *See also, Winstar, supra.* Thus, a finding that Congress intended to act for the benefit of the public does not establish *eo ipso* that abrogation of the contract terms is excusable because the government had acted as sovereign.

1(c). *Sources of the Confusion.* The cause of the Federal Circuit's analytical confusion is, at least in part, its belief that the sovereign acts analysis is meant to "determine whether the Act is designed with the *purpose* of affecting or altering the Government's prior contracts." App. 9a-10a (emphasis added). As petitioner correctly points out, this approach "wrongly transforms the sovereign acts defense into a purpose-based inquiry." Pet. 10. Predicating the analysis wholly on the underlying purpose of the legislation is problematic because "purpose" in this context is an inherently fuzzy concept. Legislation typically has multiple "purposes" that are not necessarily incompatible. The danger is that a court either imposes a false dichotomy as to the statute's purposes, in which case (as here) the analysis is skewed from the start; or the court recognizes more than one purpose, but lacks a principled basis for going any further. That is why it is critical that the linchpin of the analysis be the *effect* of the legislation on the government's

contracting partners. *Winstar* makes this clear, but the Federal Circuit misconceived that essential point.

2(a). *The Argument Itself.* The Federal Circuit's substantive argument is likewise invalid. The argument is structured as follows:

> (1) The Act requires contribution to the fund from any utility that purchased separative work units from the DOE before the Act's passage;
>
> (2) The Act does not require the contribution from a utility that contracted with the DOE if that utility re-sold the purchased services to another utility;
>
> (3) The Act does require contribution from any utility that did not have a contract with the DOE but nonetheless benefitted from the DOE's services by purchasing through the secondary market;
>
> (4) Therefore, the scope of the Act is not coincident with those utilities that had previously entered into contracts with the DOE for uranium enrichment services.
>
> (5) Because some utility contracts are not embraced by the Act, while some purchases from private entities are covered, Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements.
>
> (6) Rather, the Act targets whichever utilities benefitted from the DOE's enrichment services.

> (7) Therefore, the Act has a public and general purpose, and the sovereign acts defense applies.

App. 10a.

2(b). *Further Analytical Mistakes*. In this argument the Federal Circuit concludes that the statute is a suitable exercise of governmental sovereignty because (i) the language of the Act singles out, not previous contractors but beneficiaries of the DOE's services; and (ii) not all—and not only—previous contractors are assessed.

This argument is unsound. Neither reason is sufficient in itself to establish that the governmental action is "public and general."

i. *That the Act singles out beneficiaries of DOE's services*. As for the significance of this claim, this Court reiterated in *Winstar* that the mere fact that legislation is written in a formally general way is an insufficient predicate for concluding that its purpose is "public and general" so as to excuse the abrogation as a sovereign act. "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially on the Government's contracting partners." *Winstar*, 116 S.Ct. at 2468.

This point can be illustrated in a further way. In the instant case, it is undisputed that 85 percent of the special assessment falls on utilities that had procured enrichment services contractually from the

government. As discussed in more detail below, the lower court reasons that, because "the scope of the Act is not *coincident* with" those utilities that had contracted with the government previously, but rather covers any "ultimate beneficiary of the DOE's services," App. 10a (emphasis added), Congress therefore acted with a "public and general" purpose.

This conclusion does not follow. To see this, suppose hypothetically that there were a perfect coincidence of the two categories, contractors and beneficiaries (*i.e.*, contractors and beneficiaries were one and the same; there was no secondary market); and that, as here, the statute addressed "beneficiaries" of DOE's services. In that case, the statute, though worded to encompass both contractors and beneficiaries, would have impacted *precisely those* who had been affected by the assessment (though under the label of "beneficiaries"). The two groups—contractors and beneficiaries—would still be the operative categories, just as they are in the Federal Circuit's analysis. But clearly it would not follow that the Act would therefore have a "public and general" purpose, because *only* previous contractors would be affected. Under *Lynch*, the legislation would unquestionably be deemed unlawful, even though the Federal Circuit's formula would be applied.

ii. *That not all, and not only, previous contractors are assessed.* This claim likewise does not advance the issue. Imagine a hypothetical case that satisfies this criterion. Suppose the statute in question assessed all previous contractors of DOE's services except those who entered a contract in say, 1969, and also assessed

those utilities who contacted the DOE in 1969 about the possibility of entering a contract, but never, in fact, did so. Such legislation obviously would be ruled unlawful, even though it had been drafted in such a way as to single out not all, and not only, previous government contractors. In other words, claim (ii)—advanced by the Federal Circuit as a valid criterion of analysis—would be satisfied, yet the legislation would be impermissible. The statute would assess not all, and not only, contractors of DOE services, but would fail any rational test for qualifying as a "public and general" activity of the government.

Indeed, that there is a secondary market at all, or that 15 percent of the assessment is allocable to that group, is an empirical variable. The figure might have been 1 or 30 or 70 percent. Thus, the Federal Circuit's reliance on "beneficiaries" as the operative category of its test does not perform any genuine analytical work. It cannot be used to determine whether the Act is "public and general." That analysis can only be a function of the *effect* of the legislation.

Accordingly, neither reason (i) or (ii) constitutes a sufficient ground for the conclusion reached. Moreover, the lower court's argument gives no indication of how to combine the reasons to yield an adequate argument. The argument therefore fails.[2]

---

[2] By contrast, the dissenting opinion of Judge Mayer in the proceeding below properly characterized *Winstar*'s formulation of the sovereign acts doctrine. The dissent reasoned that the fact that "the assessment is levied on some utilities that did not contract directly with the Government, is not determinative." App. 28a. Citing the "substantial effects" standard from *Winstar*, and observing

2(c). *Sources of the Confusion*. As before, the Federal Circuit's confusion could have been avoided if the court had focused on the legislation's *effect* as a function of the government's self-interest, as *Winstar* prescribes. Instead, by imposing a false distinction as to the statute's purposes, the court traps itself into thinking that the statute must be "public and general" merely because it includes "beneficiaries" of the DOE's services.

* * *

The decision of the Federal Circuit cannot be squared with *Winstar*. The weakness of the lower court's argument indicates it has grossly misunderstood the principles this Court ennunciated in that case. If left uncorrected, the Federal Circuit's decision establishes a dangerous precedent that effectively tranforms the sovereign acts doctrine from a limited exception in the government's contracting arrangements, into a generally available *deux ex machina* the government may invoke whenever it wishes to escape the consequences of past contractual obligations.

Grant of the petition will provide the Court with the opportunity to forefend that development by clarifying, if necessary, the fundamental approach the Court articulated in *Winstar*. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) ("Because the case

---

that "85% of the special assessment fell on utilities that had procured enrichment services directly from the Government," Judge Mayer concluded that "the assessment's impact falls substantially on the Government's contracting partners" and the statute cannot therefore be a "public and general" act for purposes of the sovereign acts defense. *Id.* at 29a.

presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted *certiorari*); *Arizona v. Mauro*, 481 U.S. 520, 525 (1987) (review granted "[b]ecause the decision below appeared to misconstrue our decision in *Rhode Island v. Innis*"). Moreover, because this case arises in an area of law where enormous financial repercussions for business result from the decisions of the Federal Circuit, the prospect of that court's operating under a precedent that misconstrues *Winstar* is one that must be foreclosed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Ronald D. Maines
Counsel of Record
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

Counsel for *Amicus Curiae*